defendant was to pay to the plaintiff ten cents per perch for all stone quarried. The plaintiff committed a breach of the contract by selling stone within the prohibited district. On discovering this the defendant rescinded the contract. The plaintiff sues to recover for the stone quarried on the defendant's premises subsequent to the notice given by the defendant to the plaintiff that he had rescinded. *Held,* that he cannot recover. *Dishman* v. *Huetter* (1906), — Wash. —, 84 Pac. Rep. 590.

What breach on the part of one party to a contract will entitle the other to rescind? Certainly not all breaches will do so. *Bettini* v. *Gye,* 1 Q. B. Div. 183; *MacAndrew* v. *Chapple,* L. R. 1 C. P. 642; *Pickens* v. *Bozell,* 11 Ind. 275. A breach which does not go to the substance of the contract but which is purely technical will not entitle the other party to rescind. *Lassing* v. *James,* 107 Cal. 348. The breach of the defaulting party must be substantial and vital. *Weintz* v. *Hafner,* 78 Ill. 27. Some cases even go so far as to hold that the breach must be total or that the object for which the contract was made has been rendered unattainable. *Selby* v. *Hutchinson,* 4 Gilm. 319. The question as to what constitutes a vital breach depends on the true construction of the contract as gathered from the intention of the parties. Some parts of a contract may appear to the casual observer of very little importance, yet they may be the very foundation upon which the contract rests and vice versa. *Bettini* v. *Gye,* 1 Q. B. Div. 183; *Munsey* v. *Butterfield,* 133 Mass. 492.

CRIMINAL LAW—FORMER JEOPARDY.—Defendant was indicted for murder and convicted of manslaughter. On his second trial under the same indictment, he entered a special plea, that, having been already tried upon an indictment for murder and found guilty of manslaughter, he was thereby acquitted of murder and could only, if at all, be tried for manslaughter. *Held,* that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been rendered. *State* v. *Gillis* (1906), — S. C. —, 53 S. E. Rep. 487.

The authorities practically agree on the proposition, that when one indicted for murder is convicted of manslaughter, and, upon his own motion, secures a new trial, he may be tried on the same indictment for manslaughter on the ground that he has waived his right to plead former jeopardy as to the particular issue upon which he secured a new trial. But on the question, whether he can again be tried for murder on the same indictment, there is great conflict of authority. Investigation discloses that the greater number of authorities take the view that a verdict of manslaughter is an acquittal of murder and that a new trial granted, on motion of the accused upon conviction of the lesser offense is not to be considered as a new trial for the greater offense of which he was acquitted. Among the cases taking this view are: *State* v. *Hornsby,* 8 Robinson 583, 41 Am. Dec. 314; *Hurt* v. *State,* 25 Miss. 378, 59 Am. Dec. 225; *People* v. *Gilmore,* 4 Cal. 376, 60 Am. Dec. 620; *Johnson* v. *State,* 29 Ark. 31, 21 Am. Rep. 154; *Jones* v. *State,* 13 Tex. 168, 62 Am. Dec. 550; *State* v. *Cross,* 44 W. Va. 315, 29 S. E. 527; *State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567. Some states, how-

ever, have statutes upon this point which in effect say that the accused in such a case waives his constitutional safeguard. Some of these are: *State* v. *McCord,* 8 Kans. 232, 12 Am. Rep. 469; *Veatch* v. *State,* 60 Ind. 291; *People* v. *Palmer,* 109 N. Y. 110, 17 N. E. 213; *Commonwealth* v. *Arnold,* 83 Ky. 1, 4 Am. St. Rep. 114. Theory of the case as held is,—That the legal effect of a verdict of manslaughter on an indictment for murder is to acquit of the greater offense; but this implication or inference rests upon the existence of the verdict of manslaughter as a result of a trial upon the indictment for murder. Remove the fact upon which the inference is based and necessarily the inference goes with it. Some of the cases taking this view are: *Bohanan* v. *State,* 18 Neb. 57, 24 N. W. 390; *State* v. *Kesler,* 15 Utah Rep. 142, 49 Pac. 293; *Trono* v. *U. S.,* 26 Sup. Ct. 125, 50 L. Ed.—. The latter is the most recent case on this point and reviews most of the late decisions.

DAMAGES—RECOVERY FOR GRATUITOUS SERVICES.—Plaintiff, a passenger, injured because of a carrier's negligence, was taken to the home of sons and cared for by one of them. In an action against the carrier, it was *Held,* that the services of her sons were proper elements to consider in assessing the damages. *Lewark et al.* v. *Parkinson* (1906), — Kan. —, 85 Pac. Rep. 601.

Among other things, the court said that such elements might be considered in assessing the damages "notwithstanding the services were performed by a member of the family if the services were necessary and the charges reasonable." This, however, is not the universal rule. Some of the courts hold diametrically opposite. That nursing by a sister of charity may be shown to mitigate the damages, or that the plaintiff was doctored at a charity hospital gratuitously, was held in *Drinkwater* v. *Dinsmore,* 80 N. Y. 390. The Supreme Court of Pa. says that the plaintiff cannot recover for the nursing and attendance of members of his own household unless they are hired for that purpose. *Goodhart* v. *Pa. R. R. Co.,* 177 Pa. 1. Illinois also holds that there can be no recovery for services rendered by members of the household. This, however, is statutory. *Peoria, Decatur & Evansville R. R. Co.* v. *Johns,* 43 Ill. App. 83. Reason and the weight of authority, however, are with the principal case. If services are rendered by a member of the family or by another gratuitously it is the "good fortune of the plaintiff and a matter with which the persons liable have no concern." The wrongdoer should be held for each and every item which make up the plaintiff's loss, and the mere fact that there is no pecuniary intent in the donation of services ought not to affect the wrongdoer's liability. This view is sustained by a preponderance of authority both in the federal and state courts. *The Ferryboat D. S. and The Steamboat Geo. Washington,* 2 Ben. 226; *Denver & Rio Grande R. R. Co.* v. *Lorentzen,* 49 U. S. App. 81; *Brosnan* v. *Sweetser,* 127 Ind. 1. This class of cases must, however, be distinguished from another class where a member of a family is suing the administrator of a deceased relative for services performed for the deceased during his life. In this class there can be no recovery according to the weight of authority. *Disbrow* v. *Durand,* 54 N. J. Law 343; *Robinson* v. *Cushman,* 2 Den. 152; *Scully* v. *Scully,* 28 Iowa, 548; *Keegan* v. *Malone,* 62 Iowa 208.